No. 91-948

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF THE LUKUMI BABALU AYE, INC., and ERNESTO PICHARDO,

Petitioners,

—v.—

CITY OF HIALEAH,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' BRIEF

Steven R. Shapiro
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Jorge A. Duarte
44 West Flagler Street
Miami, Florida 33130
(305) 358-2400

Mitchell Horwich
Horwich & Zager, P.A.
1541 Sunset Drive
Coral Gables, Florida 33143
(305) 666-5299

Douglas Laycock
(Counsel of Record)
727 East 26th Street
Austin, Texas 78705
(512) 471-3275

Nina E. Vinik
American Civil Liberties Union Foundation of Florida
225 N.E. 34th Street
Miami, Florida 33137
(305) 576-2337

Jeanne Baker
Baker & Moscowitz
200 South Biscayne Boulevard
Miami, Florida 33131-5306
(305) 379-6700

QUESTIONS PRESENTED

1. In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that laws restricting religious exercise must be neutral and generally applicable. Is that rule violated by ordinances that forbid the killing of animals for ritual or sacrifice, but permit the killing of animals for a wide variety of secular reasons?

2. What must the City prove to show a compelling interest sufficient to justify a law that discriminates against religion in violation of *Employment Division v. Smith*? In particular:

   a. Must the compelling interest justify the discrimination, or is it sufficient to have an interest that would justify a nondiscriminatory general prohibition?

   b. Must the compelling interest be of extraordinary importance, or is any legitimate interest within the police power sufficient?

   c. Must the compelling interest be based on actual harms, or is it sufficient to identify risks and challenge worshipers to prove that the risks can never come to fruition?

PARTIES TO THE PROCEEDING

All parties are named in the caption of the case. The Church of the Lukumi Babalu Aye, Inc. has no parent corporations or subsidiaries.

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The opinion of the district court (Pet.App. A3) is reported at 723 F.Supp. 1467 (S.D. Fla. 1989). The opinion and orders of the court of appeals (Pet.App. A1, A50, J.A. 22) are unreported.[1]

JURISDICTION

The court of appeals entered judgment on June 11, 1991, and denied a timely petition for rehearing on August 21, 1991. The petition for *certiorari* was filed November 19, 1991. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1)(1988).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

This case involves the validity of Ordinances 87-40, 87-52, 87-71, and 87-72 of the City of Hialeah, Florida. Ord. 87-40 adopts by reference Fla. Stat. Ann. ch. 828. Of the provisions incorporated from chapter 828, petitioners challenge only one provision of §828.12.

Petitioners do not challenge the provisions on humane slaughter in Fla. Stat. Ann. §§828.22, 828.23, and 828.24 (1976 & Supp. 1992), or the prohibitions on torment and torture of animals in §828.12 (Supp. 1992), all of which are incorporated into Ord. 87-40.

The disputed portions of the ordinances, relevant portions of two accompanying resolutions, and the unchallenged Florida laws on humane slaughter are set out

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[1] The Joint Appendix is cited J.A.; the Appendix to the Petition for Writ of *Certiorari* is cited Pet.App.; the Appendix to this brief is cited Br.App. Citations to the record in the district court are by volume and page number; *e.g.*, R10-392 indicates Record volume 10 at page 392.

in the Appendix to this brief.[2] The case arises under the Free Exercise Clause, U.S. Const., amend. I, and 42 U.S.C. §1983 (1988), and these provisions are set out at Pet.App. A58.

STATEMENT OF THE CASE

This is a suit to enjoin enforcement of four ordinances enacted to prevent the practice of petitioners' religion in the City of Hialeah. These ordinances forbid the killing of animals for purposes of ritual or sacrifice. In contrast, the City and the State of Florida permit the killing of animals for any plausible secular purpose.

The district court upheld each of the ordinances against petitioners' free exercise challenge. The court of appeals accepted the district court's findings of fact and affirmed its judgment "for the reasons set forth in Parts A, B, C(1) and C(3) of the 'Conclusions of Law' in the district court's memorandum opinion." Pet.App. A2. Thus, except for Part C(2) of the opinion, the reasoning of the district court is also the reasoning of the court of appeals.

Petitioners are the Church of the Lukumi Babalu Aye, Inc., and Ernesto Pichardo, one of the priests of the Church. The Church and its members practice an ancient African religion variously known as Yoba, Yoruba, or Santeria. *Id.* at A4. Yoruba originated some four thousand years ago. *Id.* at A5. It came to the Caribbean with slavery, *id.*, and to the United States with refugees from the Cuban revolution, *id.* at A6. Santeria and Lukumi are Cuban names for the religion. Roger Bastide, *African Civilisations in the New World* 115 (Peter Green trans. 1971).

[2] These provisions also appear in Pet.App., but that printing contains minor errors in the preamble to Ord. 87-72 and in the text of §828.12.

There are fifty to sixty thousand adherents of Santeria in South Florida, and an unknown number of adherents to other religions that practice animal sacrifice. Pet.App. A6. There may be a hundred million Santeria believers worldwide. R10-392.

An integral part of Santeria is the sacrifice of chickens, pigeons, doves, ducks, guinea fowl, goats, sheep, and turtles. Pet.App. A9. These animals are sacrificed for birth, marriage, and death rites, for the cure of the sick, for the initiation of new members or priests, and for an annual celebration. R11-626, R12-810. The faith could not survive without animal sacrifice, because sacrifice is essential to the initiation of new priests. R12-862. Most of the animals are cooked and eaten in a ritual feast following the sacrifice. Pet.App. A9, R15-1249. But if the animal is sacrificed on the occasion of death or sickness, the sickness is believed to have passed into the animal, and the animal is not eaten. Pet.App. A9 & n.11, A16-A17 & n.26.

Because of persistent hostility and discrimination, Santeria has remained underground in Cuba and the United States. *Id.* at A5-A7. This case was precipitated when petitioners leased a vacant used car lot and announced plans to open a church. The City responded with three resolutions and four overlapping ordinances prohibiting the religious sacrifice of animals. Br.App. A1-A5. These ordinances were enacted "in a mob atmosphere." Pet.App. A27. Angry speakers denounced the Church and misstated its practices. One speaker said that if the Council permitted the Church to worship, the country would "regress into paganism." Pl.Ex. 10 at 4, R8 at 81-82. Another said "the city would not please God." Pl.Ex. 10 at 5. Councilman Martinez argued that if the religion was "not permitted in Cuba, why bring it to the United States?" *Id.* at 6.

The ordinances are carefully drafted to prohibit religious sacrifice but not to interfere with secular reasons

for killing animals. Ordinances 87-52 and 87-71 forbid "sacrifice," which they define as follows: "to unnecessarily kill . . . an animal in a ritual or ceremony not for the primary purpose of food consumption." Br.App. A1-A3. Ord. 87-40 forbids "unnecessary" killings of animals; the City claims that sacrifice is unnecessary. Br.App. A1, A5. Ord. 87-72 confines slaughter to slaughterhouses. Br.App. A3-A4. This ordinance applies to petitioners only on the theory, rejected in Ordinances 87-52 and 87-71, that petitioners are engaged in slaughter. Ordinances 87-52, 87-71, and 87-72 draw distinctions based on the primary and secondary reasons for killing an animal; these distinctions gerrymander the reasons for killing animals so that only religious sacrifice is forbidden. Br.App. A1-A4. This brief will develop the basic principles applicable to the case before attempting detailed textual analysis of these ordinances.

Following a nine-day bench trial, the district court found that the ordinances were intended to prevent religious sacrifice of animals, Pet.App. A28, that the ordinances burden petitioners' religion, *id.* at A42, and that "the ordinances are not religiously neutral," *id.* at A23. But it concluded that the City is not required to treat religion with neutrality. *Id.* at A40.

The district court went on to hold that the ordinances are justified by several compelling interests. In reaching this conclusion, the court equated compelling interest with any legitimate public policy. *Id.* at A44-A45.

First, the district court held that the City had a compelling interest in protecting animals. In Santeria rituals, the animals are sacrificed by cutting the carotid arteries. *Id.* at A12. Cutting the carotid arteries is the method prescribed as humane by Florida and federal law. Fla. Stat. Ann. §828.23(7)(b)(1976)(Br.App. A7); 7 U.S.C. §1902(b)(1988). But the district court found that "there is no guarantee that a person performing the sacrifice in

the manner described can cut through both carotid arteries at the same time." Pet.App. A13. Because of this and related uncertainties, the district court found that not all sacrificed animals would die instantly. *Id.* at A13-A14, A45. It also found that the animals experience fear before the sacrifice, *id.* at A14, A45, and that petitioners could not guarantee that persons not party to the litigation would care for animals humanely before sacrifice, *id.* at A46 & n.58.

Second, the district court found two risks to health, one public and one private. The public health risk was that some unidentified practitioners of animal sacrifice sometimes dispose of carcasses in public places. *Id.* at A43. However, the district court found that there "have been no instances documented of any infectious disease originating from the remains of animals being left in public places." *Id.* at A18. The private health risk was that worshipers often eat the uninspected meat of sacrificed animals. *Id.* at A43-A44. But the City presented no evidence that anyone had ever become ill from eating this meat.

Third, the district court found a compelling interest in preventing animal sacrifice in areas "not zoned for slaughterhouse use." *Id.* at A45. The court did not explain what this interest was or why it was compelling. The used car lot that petitioners selected for their church was zoned for churches. *Id.* at A24 n.41. Moreover, parts of the city are rural, and there are farms within the city limits. R10-458, R15-1332.

The district court entered judgment before the decision in *Employment Division v. Smith*, 494 U.S. 872 (1990); the appeal was briefed and argued after *Smith*. Petitioners argued in the court of appeals that the ordinances violated *Smith* because they were neither neutral nor generally applicable. The City conceded that "neither the State of Florida nor the City of Hialeah has enacted a generally applicable ban on the killing of ani-

mals." Br. of Appellee in Ct.App. 21. Even so, the court of appeals found it unnecessary to "decide the effect of *Smith*." Pet.App. A2 n.1. Rather, it held that the ordinances were justified by compelling interests even if they violated *Smith*. The court of appeals relied on the district court's opinion with respect to three compelling interests -- harm to animals, health risks, and zoning.[3]

SUMMARY OF ARGUMENT

Government cannot regulate religion, except as the incidental effect of neutral and generally applicable laws, or to serve a compelling interest by the least restrictive means. Laws are subject to the compelling interest test if they overtly discriminate against religion, if they are enacted because of an anti-religious motive, or if their anti-religious effect is exclusive or dominant instead of merely incidental. *Employment Division v. Smith*, 494 U.S. 872.

The ordinances in this case were directed against a religious practice. The preambles and accompanying resolutions recite, and the trial court found, Pet.App. A28, that these ordinances were enacted for the express purpose of suppressing the religious ritual of animal sacrifice. The ordinances were enacted "in a mob atmosphere," *id.* at A27, in response to petitioners' announced plans to open a church and worship in public, *id.* at A28.

By expressly prohibiting "sacrifice" and "ritual" killings of animals, by the theological judgment that animal sacrifice is "unnecessary," and by religious gerrymanders based on primary and secondary purposes for killing animals, these ordinances forbid the killing of animals for

[3] The district court also held that children attending the sacrifices might suffer psychological damage. Pet.App. A44. This holding was contained in the one part of the opinion (C(2)) on which the court of appeals expressly disclaimed any reliance. Pet.App. A2.

religious purposes without forbidding the killing of animals for any plausible secular purposes. State and local law permit animals to be killed for food, sport, medical research, and many reasons of human convenience.

This discrimination is not justified by any compelling interest. A compelling interest in discriminating against religion must justify the discrimination, because the alleged interest must fit the enacted ordinance. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, __ U.S. __, 112 S.Ct. 501 (1991). The interest must be of the highest order, and the City must prove actual harms that it has a compelling interest in preventing. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972), reaffirmed in *Smith*.

The alleged interests in this case fall far short of these standards. In analogous secular contexts, the City either does not pursue its asserted interests at all, or it pursues them to a lesser degree and by less restrictive means. None of the City's interests is sufficiently important to be compelling, and most of them are speculative and unproven. The courts below did not require the City to prove actual harm to an interest of the highest order; instead, they repeatedly required petitioners to "guarantee" that no harm could ever come of anything connected with animal sacrifice. *See, e.g.*, Pet.App. A13.

The factual testimony of the City's experts does not support a legal conclusion of compelling interest. Those experts testified that sacrificed animals become unconscious "very rapidly" when sacrifice is performed as intended, and within "seconds to minutes" even when a mistake is made. R12-891. Hunting and trapping and many other activities inflict greater pain than sacrifice. The public health officer testified that sacrificed animals can be safely disposed of in a plastic bag and a garbage can, R11-555, and that the problem of sacrificed animals is a very small part of the general problem of organic

garbage.

The ordinances cannot be justified as zoning laws. Because there is no neutral and generally applicable law against the killing of animals, petitioners' sacrifice is a constitutionally protected activity. A constitutionally protected activity cannot be entirely excluded from the City through exclusionary zoning. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

The courts below upheld these ordinances because they misunderstood two legal principles. They did not believe that government must be neutral toward religion. Pet.App. A40. And they assumed that any "valid exercise of the police power" is a compelling interest. *Id.* at A44-A45.

ARGUMENT

I. THE ORDINANCES DISCRIMINATE AGAINST RELIGION

Concurring separately in *Employment Division v. Smith*, Justice O'Connor said that "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such." 494 U.S. at 894. But that is exactly what Hialeah has done here. This case began when petitioners announced their intention to open a church and worship in public. The City responded with ordinances designed to suppress religious sacrifice of animals without inconveniencing any other resident of Hialeah.

These ordinances forbid the religious sacrifice of animals; they do not forbid the killing of animals for food, for recreation, or for human convenience. These secular killings are not merely permitted; they are often expressly authorized and affirmatively encouraged. What Hialeah's ordinances prohibit is killing an animal for "sacrifice" in a "ritual or ceremony."

All the issues in this case flow from this distinction between sacrificial and nonsacrificial killings of animals. The four overlapping, repetitive, and gerrymandered ordinances, and the after-the-fact rationalizations based on alleged compelling interests that the City does not pursue in any other contexts, are all attempts to disguise this central distinction in a way that might escape judicial scrutiny.

A. Laws That Burden Religious Exercise Must Be Neutral And Generally Applicable

Employment Division v. Smith holds that a "neutral, generally applicable regulatory law" may be applied to religiously motivated conduct without compelling justification. 494 U.S. at 880. But *Smith* gives new emphasis to the requirement that laws restricting religion be neutral and generally applicable. That requirement is now the principal constitutional protection for free exercise of religion. It is of great importance for this Court to give meaningful content to that protection.

Neither of the courts below considered the implications of *Smith*. The district court could not do so, because *Smith* had not yet been decided. The court of appeals refused to do so, holding that it could decide this case without deciding the effect of *Smith*. Pet.App. A2 n.1. The court of appeals relied on the district court's belief, erroneous even before *Smith*, that government has no obligation to treat religion neutrally. *Id.* at A40.

In at least three formulations, each approaching the problem from a slightly different perspective, this Court in *Smith* insisted on neutrality and general applicability. First, *Smith* says a law is unconstitutional if it singles out religion for special regulation:

> a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are en-

> gaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes."

494 U.S. at 877-78. The Court's hypothetical is this case: these ordinances expressly and uniquely forbid the killing of animals for worship purposes.

Second, a law is subject to stringent review under *Smith* if it is "specifically directed at [a litigant's] religious practice." *Id.* The Court elaborated on this point in a tax example, which it treated as equivalent to regulation:

> if prohibiting the exercise of religion . . . is *not the object* of the tax *but merely the incidental effect* of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

Id. at 878 (emphasis added). This requirement of merely incidental effect has two implications: the purpose or "object" of the law cannot be anti-religious, and the dominant effect cannot be anti-religious. The Hialeah ordinances fail both of these standards. The City's purpose was clear, and suppression of religion is virtually the only effect of the ordinances.

Third, *Smith* says that if the legality of a regulated act depends upon the actor's motives, religious motives must be included among the motives that are legally permitted. *Id.* at 884. This was the Court's rationale for reaffirming the line of unemployment compensation cases beginning with *Sherbert v. Verner*, 374 U.S. 398 (1963).[4]

[4] *Accord, Frazee v. Illinois Dep't of Employment Security*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981).

The states in those cases had accepted some reasons for quitting employment, but had refused to accept religious reasons. In *Smith*, the Court said that the unemployment compensation cases

> stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.

494 U.S. at 884. Secular reasons for killing animals are exempt from, or simply outside the scope of, Hialeah's ordinances. But Hialeah has not extended the same treatment to religious reasons for killing animals.

The three formulations in *Smith* are mutually reinforcing elements of the requirement that government be neutral toward religion. A law is invalid if it overtly discriminates against religion, if it is enacted for anti-religious motives, if it exempts secular conduct but not religious conduct, if it treats religious reasons for acting less favorably than secular reasons for acting, or if its dominant effect (and not merely an incidental effect) is to suppress religious exercise.

B. These Ordinances Are Neither Neutral Nor Generally Applicable

The ordinances challenged in this case fail each of these tests. Two of the ordinances overtly discriminate against religion. All of them were enacted for the sole purpose of suppressing a religious practice, and that is almost their only effect. All of them recognize good and bad reasons for killing animals, and classify religious reasons as bad. They are not in any sense religiously neutral or generally applicable.

1. The Discriminatory Pattern Common To All The Ordinances

a. Discrimination Against Religious Reasons For Killing Animals. To implement its discriminatory purposes, the City created three statutory categories of killings of animals: to "sacrifice," meaning a killing for ritual; to "slaughter," meaning a killing for food consumption; and by implication, all other killings of animals.[5] Sacrifice is absolutely forbidden. Ord. 87-71 §3 (Br.App. A3). Slaughter is confined to properly zoned slaughterhouses, Ord. 87-72 §3 (Br.App. A3), to small producers of beef and pork, *id.* §6 (Br.App. A4), or to other licensed establishments, Ord. 87-52, Hialeah Code §6-9 ¶3 (Br.App. A2). Killings that are neither for food nor for sacrifice are regulated only by Ord. 87-40 (Br. App. A1), which incorporates pre-existing state law.

Neither the State of Florida nor the City of Hialeah has enacted anything remotely approaching a generally applicable ban on the killing of animals. The laws of Florida and of Hialeah provide for slaughterhouses and the killing of animals for food, and meat is sold in Hialeah. *See, e.g.*, Fla. Stat. Ann. §§828.22 to 828.26 (1976 & Supp. 1992)(excerpted at Br.App. A6-A7), incorporated in Ord. 87-40.

Hunting, fishing, and trapping in Florida are recreations of constitutional status, Fla. Const. art. 4 §9, beyond the power of municipal regulation. *Bell v. Vaughn*, 21 So.2d 31 (Fla. 1945). The right to hunt on private land is a property right protected by the takings clause. *Alford v. Finch*, 155 So.2d 790, 793 (Fla. 1963). It is lawful to fish in Hialeah, and it is lawful for residents of Hialeah to go hunting and trapping and return with their kill. It is *un*lawful to help animals escape from hunters.

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[5] *See* the definitions in Ordinances 87-52, 87-71, and 87-72 (Br.App. A1-A3).

Fla. Stat. Ann. §372.705 (Supp. 1992).

Public officials and humane societies may kill "injured, sick, or abandoned" or "diseased" domestic animals. Fla. Stat. Ann. §§828.05, 828.055 (Supp. 1992), incorporated in Ord. 87-40. Public or private animal shelters and similar facilities may kill "stray, neglected, abandoned, or unwanted animals." *Id.* §828.058, incorporated in Ord. 87-40. Animals judicially removed from their owners may be killed "for humanitarian reasons" or if the animal "is of no commercial value." *Id.* §828.073(4)(c)2, incorporated in Ord. 87-40. Animals may be killed or subjected to pain and suffering "in the interest of medical science." *Id.* §828.02 (1976), incorporated in Ord. 87-40. It is lawful to exterminate any animal that is "undesirable," *id.* §482.021(17)(1991), expressly including birds and mammals, §482.021(15)(c)(1991). Property owners may put out poison in their yards and enclosures, *id.* §828.08 (1976), incorporated in Ord. 87-40. Hialeah has not interfered with the sale of lobsters to be boiled alive, R15-1336, and the record does not show that it has interfered with the practice of feeding live rats to pet snakes.

In short, there are many reasons for killing animals, and nearly all of them are acceptable to the City. Animals may be killed for food or for sport, because they are sick or injured, or merely because they are "stray," "unwanted," "undesirable" or "of no commercial value." Any resident of Hialeah can kill an unwanted pet in his yard or in his home, so long as he does not do so in a ritual or ceremony. Petitioners have found no reported prosecution in Florida for an unaggravated killing, as distinguished from torture or cruelty to a living animal.

Religious faith is an unacceptable reason for killing animals -- almost the only unacceptable reason. This is rank discrimination against religion. If the City recognizes that there are acceptable reasons for killing animals, then it must classify religion among those accepta-

ble reasons. This is the lesson of *Smith* and of the unemployment compensation cases as reinterpreted in *Smith*. 494 U.S. at 877-78, 884.

The courts below erred because they misunderstood this fundamental point. The court of appeals relied on the district court's conclusion that the ordinances were valid "even if the use of the words 'ritual' and 'ceremony' are understood as targeting primarily religious conduct." Pet.App. A40. The district court thought that government could target religion because "[s]trict religious neutrality is not required." *Id.* The district court supported this proposition by citing Establishment Clause cases, including a summary affirmance upholding a federal statute that *exempts* ritual slaughter from restrictive regulation. *Id.*, *citing Jones v. Butz*, 374 F.Supp. 1284 (S.D. N.Y.), *aff'd mem.*, 419 U.S. 806 (1974). But none of the cases cited upheld a discriminatory *restriction* on religious exercise. The courts below ignored the settled distinction between religious exemptions and religious restrictions. This Court has repeatedly held that legislatures may exempt religion from regulation. *Smith*, 494 U.S. at 890; *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). But legislatures may not regulate religion except as an incidental application of neutral and generally applicable law. *Smith*, 494 U.S. at 877-78.

Hialeah has not enacted a neutral and generally applicable law. Because these ordinances discriminate against religious reasons for killing animals, they must be justified by a compelling interest.

b. The Purpose To Suppress Religion. The record is clear that the purpose of Hialeah's ordinances was not neutral toward religion. To the contrary, the district court found that these ordinances were "prompted by the Church's public announcement that it intended to come out into the open and practice its religious rituals," and that "the council's intent was to stop animal sacrifice whatever individual, religion or cult it

was practiced by." Pet.App. A28. The City openly declared in resolutions and preambles that its target was "certain religions" (Resolution 87-66, Br.App. A4), and that its policy was to oppose "public ritualistic animal sacrifices" and similar formulations. *See* Resolution 87-90 (Br.App. A4-A5), and the preambles to ordinances 87-40, 87-52, and 87-71 (Br.App. A1-A2).

In the language of *Smith*, these ordinances were "specifically directed" to religious conduct; suppression of worship services was the "object," and not merely "the incidental effect." 494 U.S. at 878. The City claims that the ordinances are neutral *among* religions, because they forbid all religious sacrifice of animals. But they are not neutral *toward* religion. Their purpose was to suppress petitioners' religion and any similar religions in the City.[6]

2. The Text Of The Ordinances

In this section, we review the text of the individual ordinances, show how each singles out religious sacrifice for discriminatory treatment, and further develop the basic principle of religious neutrality.

a. Ord. 87-71. Ord. 87-71 provides:

> **Section 1.** For the purpose of this ordinance, the word sacrifice shall mean: to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.
>
> . . . .
>
> **Section 3.** It shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate

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[6] Even the claim of neutrality *among* religions is doubtful. An implicit exemption for Kosher slaughter is discussed *infra* at 24.

limits of the City of Hialeah, Florida.

Because this ordinance singles out religious conduct for separate prohibition, it is unconstitutional unless justified by a compelling interest. Unconstitutionality is revealed by three terms of the ordinance: "sacrifice," "ritual or ceremony," and "unnecessarily."

The reference to "torment, torture, and mutilation" is not at issue, because these acts are neither necessary nor sufficient to a violation. Killing in a ritual or ceremony is a forbidden sacrifice even if done humanely; torment, torture, and mutilation are not forbidden by this ordinance unless they occur in a ritual or ceremony. In any event, torment, torture, and mutilation are already forbidden in neutral terms by Fla. Stat. Ann. §828.12, incorporated in Ord. 87-40, and petitioners do not challenge that prohibition. The only reason for Ord. 87-71 is to forbid killing of animals in a "ritual or ceremony not for the primary purpose of food consumption."

i. "Sacrifice." Only sacrifice is an offense, and sacrifice is an explicitly religious practice. "Sacrifice" is from the same Latin root as "sacred" and "sacrament;" its original and still primary meaning is an offering "to a deity." *Webster's Third New Int'l Dictionary of the English Language Unabridged* 1996 (1981). Animal sacrifice is one of the oldest and most widespread religious practices. *See* Joseph Henninger, *Sacrifice*, in 12 Mircea Eliade, *Encyclopedia of Religion* 544, 554-55 (1987).

Animal sacrifice remains important in modern Islam. The Feast of Sacrifice, Id-Ul-Adha, culminates the pilgrimage to Mecca, and is also celebrated with sacrifices in the homes of observant Muslims who are not on pilgrimage. Cyril Glasse, *The Concise Encylopaedia of Islam* 178 (1989). Muslims may also sacrifice an animal when a child is born, or "at any time with the intention of coming closer to God." *Id.* at 340.

Animal sacrifice was central to the Jewish scriptures

and to Jewish ritual practice. *See, e.g.*, Genesis 4:2-5 (Cain and Abel), Exodus 12:3-10 (Passover), Leviticus 1-7 (rules for ritual sacrifice), Luke 2:24 (sacrifice by Mary and Joseph). Because Jewish sacrifice was centralized at the Temple in Jerusalem, it ended abruptly when the Romans destroyed the Temple. Orthodox Jews now debate whether sacrifice should be resumed on the recaptured Temple site, or only when the Temple itself is reconstructed. 1 J. David Bleich, *Contemporary Halakhic Problems* 244-69 (1977).

Christians dispensed with animal sacrifice because they believe that Christ's sacrifice on the cross is good for all time and all people. Hebrews 7:27, 8:12-14. A speaker at the city council meeting supported the ordinances on this ground. Pl.Ex. 10 at 5, R8 at 81-82. Christianity remains rich in the symbolism and theology of sacrifice. Christ is described as "the Lamb of God," John 1:29, Revelation 7:14-17, and Holy Communion is a periodic re-enactment of His sacrifice. Johannes Betz, *Eucharist*, in Karl Rahner, ed., *Encyclopedia of Theology* 447, 456 (1975); Otto Semmelroth, *Sacrifice*, in *id.* 1488, 1494-95.

Ord. 87-71 expressly forbids a religious ritual and nothing else. Such a prohibition is unconstitutional unless justified by a compelling interest.

ii. "Ritual Or Ceremony." The ordinance defines sacrifice as unnecessarily killing an animal in a "ritual or ceremony not for the primary purpose of food consumption." Ritual or ceremony is the essence of the offense. "Ritual" is also a religion-laden term; to prohibit ritual is to prohibit religion.

The courts below suggested that the ordinance is not limited to *religious* rituals. Pet.App. A40. The ordinance would also forbid the killing of animals in secular rituals, if any such rituals were ever found in Hialeah. There are multiple errors in this reasoning. If an ordinance so

directly targeted at religion can be saved by hypothetical secular applications, then no religion is protected. A city seeking to forbid the Catholic Mass and the Protestant Communion service would simply have to track the drafting technique of Ord. 87-71:

> For the purposes of this Ordinance, to take communion means: to unnecessarily consume wine or grape juice in a ritual or ceremony not for the primary purpose of refreshment or intoxication. It shall be unlawful to take communion within the corporate limits of the City.

By the lower courts' reasoning, such a law forbidding Communion would raise no issue under the Free Exercise Clause, because it might also apply to secular rituals.

Besides, there was no evidence that animals are killed in secular rituals in Hialeah. The trial judge recognized that the ordinances have no secular applications when he refused to make an exception for Santeria: "Any contemplated exception would have to cover all religions. The exception would, in effect, swallow the rule." Pet.App. A47. The reason a religious exception would swallow the rule is that the rule has only religious applications.

The City's efforts to imagine potential secular applications of the ordinance have not been successful. The City has suggested voodoo rituals, satanic rituals, and cockfights. Op. Cert. at 8. Each of these applications is disputed, but the testimony left these disputes relatively undeveloped.[7] Even if the City were correct about all

[7] The ordinances at issue do not appear to forbid cockfighting, because the birds are not killed for food and a cockfight is not a ritual or ceremony. Cockfighting is illegal in Florida but common in Hialeah, and enforcement is sporadic. R8 at 126-27, R10 at 453-69. (continued...)

three, the ordinances would not be generally applicable. They would not even come close.

Petitioners claim that these ordinances single out a despised minority religion for special restrictions. The City responds that the ordinances might also apply to two other groups who are even more despised and whose religious status is disputed, and to a disreputable recreation that has long been illegal under other laws. Hialeah does not satisfy its obligation of neutrality by treating religious reasons like the worst-treated, least-approved secular reasons. Rather, because religious exercise is a constitutional right, Hialeah must treat religious reasons as well as it treats the most valued and acceptable secular reasons.

Hialeah's claim of arguably secular applications wholly misunderstands the logic of *Smith*. *Smith* assumes that if religion is subject only to generally applicable

[7] (...continued)
ah, and enforcement is sporadic. R8 at 126-27, R10 at 453-69.

Expert witnesses for both sides referred to voodoo as a religion, R9 at 283, 300, R14 at 1070, 1078, and the trial court assumed that voodoo is a religion, Pet.App. A6. The City's witness Mark Paulhus described satanism in religious terms, R14 at 1073-76, but the trial court assumed that satanic cults "would probably not enjoy First Amendment protection," Pet.App. A40. Groups that call themselves satanic can be radically different from each other; some sacrifice animals and some do not, and from summary accounts, some appear to be religious and some do not. *See* J. Gordon Melton, *Encyclopedia of American Religions* 145-46 (3d ed. 1989). Mr. Paulhus had seen no evidence of satanism in South Florida, R14-1073, and no issue is presented concerning either voodoo or satanism.

Both voodoo and satanism are quite distinct from Santeria. *See* Melton at 143; Joseph Murphy, *Santeria*, in 13 Eliade, *Encyclopedia of Religion* 66-67; George Simpson, *Afro-Caribbean Religions*, in 3 *id.* at 90-92. Mr. Paulhus acknowledged that voodoo and Santeria had evolved separately, although he emphasized the similarity that both blend elements of African religion with elements of Christianity. R14 at 1078-79.

laws, then religious minorities will be protected by the political process. Legislatures can impose on religious minorities only those laws they are willing to impose on all their constituents. Justice Jackson set forth the essential point a generation ago:

> [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949)(concurring), quoted with approval by the Court, *Larson v. Valente*, 456 U.S. 228, 245-46 (1982); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972). If Hialeah applied its rules against killing animals to hunters, fishers, farmers, pet owners, veterinarians, and exterminators, to say nothing of the meat industry and meat eaters, one suspects that the political retribution would be overpowering. But there is no such guarantee of political protection in a claim that a law applies to two or three small and unpopular minorities instead of one. Such a law is *not* generally applicable.

If facial neutrality is to be an important threshold inquiry in free exercise cases, judges must not be diverted by euphemisms and circumlocutions. A prohibition on "sacrifice," which is triggered only when otherwise permissible conduct occurs in a "ritual or ceremony," prohibits the free exercise of religion. Any such prohibition must be justified by a compelling interest.

iii. "Unnecessarily." Under Ord. 87-71, a killing is a forbidden sacrifice only when an animal is "unnecessarily" killed in a ritual or ceremony. Lack of necessity is an element of the offense; Hialeah can never prove a violation of Ord. 87-71 without proving that the sacrifice was unnecessary. But as discussed immediately below, the necessity of sacrifice is a theological judgment that no governmental unit can make.

b. Ord. 87-40. Ord. 87-40 merely enacts Fla. Stat. Ann. ch. 828 as a city ordinance. The City claims that the italicized part of §828.12 (as it read in 1987) forbids animal sacrifice:

> *Whoever unnecessarily* overloads, overdrives, tortures, torments, deprives of necessary sustenance or shelter, or unnecessarily or cruelly beats, mutilates or *kills any animal*, or causes the same to be done, or carries in or upon any vehicle, or otherwise, any animal in a cruel or inhuman manner, *shall be guilty of a misdemeanor* of the first degree, punishable by as provided in §775.082 or by a fine of not more than $5,000, or both.[8]

The City contends that religious sacrifice of animals is unnecessary, and therefore unlawful. The City obtained an opinion of the Florida Attorney General to this effect. Fla. Atty. Gen'l Opinion 87-56, Annual Report at 146, 149 (1987). He appears to define unnecessary as "without any useful motive, in a spirit of wanton cruelty or for the mere pleasure of destruction without being in any sense beneficial or useful." *Id.* n.11. But neither Hialeah nor the Attorney General has power to decide that religious worship is unnecessary, or to render

[8] The state enacted minor amendments to §828.12 in 1989, but these were not incorporated into the Hialeah ordinance enacted in 1987. Both versions of §828.12 are set out at Br.App. A5-A6.

theological judgment on what rituals are necessary to worship, or to decree which forms of worship are "beneficial or useful." Neither can take sides "in controversies over religious authority or dogma." *Smith*, 494 U.S. at 877; *accord, United States v. Ballard*, 322 U.S. 78, 86-88 (1944).

To decide that an act of worship is unnecessary is obviously not religiously neutral. A standard of lack of necessity cannot be applied to religion in a neutral way. From the perspective of the believer, religious acts are always necessary, and the religious judgment controls. Any attempt to question the necessity of animal sacrifice raises an issue of religious doctrine, and even when attempting to apply neutral principles of secular law, "the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." *Jones v. Wolf*, 443 U.S. 595, 604 (1979); *accord, Serbian E. Orthodox Church v. Milivojevich*, 426 U.S. 696, 708-20 (1976). If the City recognizes some killings of animals as necessary, then it must recognize religious killings of animals as necessary.

Even if it were theoretically possible to apply a necessity standard to religion in a nondiscriminatory way, Hialeah has not done so. City and state law obviously assume that it is "necessary" to kill fish and game animals for recreation, that it is "necessary" to kill unwanted pets for human convenience, and so on across a vast range of secular reasons for killing animals. Petitioners have found no successful prosecution in Florida for the "unnecessary" killing of an animal. The only reported case holds that the use of live rabbits to train greyhounds is *not* unnecessary killing or torment. *Kiper v. State*, 310 So.2d 42 (Fla.App. 1975).[9]

[9] *But cf.* Fla. Atty. Gen'l Opinion 90-29 (1990), expressing the view that killing animals and using the carcasses to train greyhounds vio- (continued...)

Because the City's interpretation of the necessity standard discriminates against religion, and because the necessity standard cannot be applied to religion at all, ordinances 87-40 and 87-71 are unconstitutional unless their application to religion is justified by a compelling interest.

c. Ord. 87-52. Ord. 87-52 is convoluted, but the bottom line is the same. Ord. 87-52 added §§6-8 and 6-9 to the City Code. Section 6-9 reads as follows:

> **Section 6-9.** Prohibition Against Possession Of Animals for Slaughter Or Sacrifice.
>
> 1. No person shall own, keep or otherwise possess, sacrifice, or slaughter any sheep, goat, pig, cow or the young of such species, poultry, rabbit, dog, cat, or any other animal, intending to use such animal for food purposes.
>
> 2. This section is applicable to any group or individual that kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.
>
> 3. Nothing in this ordinance is to be interpreted as prohibiting any licensed establishment from slaughtering for food

[9] (...continued)
lates the law against "unnecessary" killings, because this practice "is outside the usual course of business for this industry." This opinion appears to be inconsistent with *Kiper*. In any event, its rationale is inapplicable to petitioners, because animal sacrifice is central to "the usual course" of their religion. The practice of using live rabbits to train greyhounds is now forbidden by a separate statutory provision, in which necessity is not an element of the offense. Fla. Stat. Ann. §828. 122(2)(a), (3)(a)(Supp. 1992).

> purposes any animals which are specifically raised for food purposes where such activity is properly zoned and/or permitted under state and local law and under rules promulgated by the Florida Department of Agriculture.

i. Paragraph 1. The interaction of paragraphs 1 and 3 permits nearly all secular killings of animals. If the killing is *not* for food, it is outside the scope of the prohibition in ¶1. If the killing is *specifically* for food, it can be licensed and exempted under ¶3.

But petitioners' sacrifices are forbidden by ¶1's express prohibition of "sacrifice." Petitioners fall within ¶1's prohibition, because most of the animals are eaten in a ritual feast following the sacrifice. Thus, petitioners "intend" to use the animals for food. But petitioners are not within ¶3's exception, because the City would not grant a license for sacrifice, and because in the City's view, the sacrificed animals are not raised "specifically" for food. In the City's view, the primary purpose is religious worship, not food.

This distinction between primary and secondary purposes runs through the ordinances. "Sacrifice" is defined as "not for the *primary* purpose of food consumption." The courts below concluded that Kosher slaughter is exempt from Hialeah's ordinances, because those courts believed that Kosher slaughter is for the primary purpose of food consumption and only secondarily for religion. Pet.App. A31. The ordinances apply to Santeria sacrifice only on the theory that its priorities are reversed -- that sacrifice is primarily for religion and only secondarily for food.

By tying the ordinance to a purpose that is secondary to petitioners' religion, but primary to many secular killings of animals and perhaps primary to other religious killings, and by distinguishing primary from secondary purposes, the City has once again singled out petitioners for special and discriminatory regulation. Discrimination between religions violates the Establishment Clause, *Larson v. Valente*, 456 U.S. at 244, as well as the free exercise rights of Santeria. Unless justified by a compelling interest, ¶1 is unconstitutional.

ii. Paragraph 2. Paragraph 2 is even more obviously discriminatory. It forbids killing or sacrifice "for any type of ritual," "whether or not" the animal is later consumed as food. Once again, the essential element of the violation is ritual sacrifice. For a group that participates in ritual sacrifice, food consumption is not necessary to a violation of Ord. 87-52. All of ¶2, and the prohibition on "sacrifice" in ¶1, expressly discriminate against religion. Unless justified by a compelling interest, these provisions are unconstitutional.

d. Ord. 87-72. Ord. 87-72 defines "slaughter" to mean "the killing of animals for food." It then provides:

> **Section 3.** It shall be unlawful for any person, persons, corporations or associations to slaughter any animal on any premises in the City of Hialeah, Florida, except those properly zoned as a slaughter house, and meeting all the health, safety and sanitation codes prescribed by the City for the operation of a slaughter house.
>
> . . . .
>
> **Section 6.** This Ordinance shall not apply to any person, group or organization that slaughters, or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.

Given the City's distinction between "sacrifice" and "slaughter," this Ordinance appears inapplicable to peti-

tioners. If petitioners are engaged in "slaughter," all these ordinances are plainly pre-empted by Florida and federal statutes protecting ritual slaughter.[10] The City successfully argued below that the ordinances are not pre-empted by Florida law because petitioners are *not* engaged in slaughter. Br. of Appellee in Ct.App. 46-47. But the City cannot apply Ord. 87-72 unless it argues that petitioners *are* engaged in slaughter. The City cannot have it both ways; Ord. 87-72 is either pre-empted or inapplicable. This ordinance depends for its enforcement on simultaneous assertion of two inconsistent legal theories; such an ordinance highlights the City's determination to get petitioners one way or another.

The attempt to apply Ord. 87-72 also depends on a discriminatory misclassification of petitioners' conduct. By again focusing on the secondary fact that many of the sacrificed animals are subsequently eaten, the City misclassifies petitioners' church as a slaughterhouse. This misclassification enables the City to exclude petitioners' church, because no land in the city is zoned for slaughterhouses. Pet.App. A33 n.46.

As a deputy city attorney testified, petitioners' church is not a slaughterhouse. R15-1345. It is not in the business of selling food in the open market, and the numbers of animals sacrificed are a tiny fraction of the numbers killed in a slaughterhouse. Section 6 recognizes that even small commercial operations are not slaughterhouses and do not require the same regulation as slaughterhouses. But it exempts only the small scale slaughter of cattle and hogs. It does not exempt petitioners' goats and chickens.

It is not neutral to apply slaughterhouse rules to petitioners' sacrifices unless the City applies slaughter-

[10] These statutes are briefly described *infra* in note 12 and accompanying text.

house rules to all the other killings of animals in the City. The City cannot avoid all scrutiny of its justifications by arbitrarily equating any killing of an animal for food with the operation of a slaughterhouse. Nor can it enforce a law enacted for the very purpose of suppressing the central religious ritual of a minority religion. Unless justified by a compelling interest, Ord. 87-72 is invalid.

* * *

Smith leaves precious little protection for the free exercise of religion. If this Court permits even that protection to be evaded by clever drafting and a mere pretense of neutrality, then it has indeed repealed the Free Exercise Clause. As Justice Harlan once said in a related context, "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970)(concurring).

This Court has long recognized that legislatures and city councils could readily suppress unpopular groups unless courts scrutinize legislative motive and legislative gerrymanders. *See Fowler v. Rhode Island*, 345 U.S. 67 (1953)(ordinance drafted to forbid Jehovah's Witness services without reaching more conventional religious services); *cf. Davis v. Bandemer*, 478 U.S. 109 (1986)(political gerrymandering); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)(racial gerrymandering); *Guinn v. United States*, 238 U.S. 347 (1915)(grandfather clause); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)(discriminatory enforcement). If ordinances like these from Hialeah are allowed to stand, it will be open season on unpopular religions.

II. THE ORDINANCES ARE NOT JUSTIFIED BY A COMPELLING INTEREST

A. The Courts Below Applied Erroneous Legal Standards To The Compelling Interest Issues

Employment Division v. Smith divides laws restricting religious exercise into those that are religiously neutral and those that are not. Laws that are religiously neutral are immune from strict scrutiny. Laws that are not religiously neutral can be justified, if at all, only by the most compelling state interests. It is hard to imagine a compelling need to discriminate against religion; certainly no such compelling need is presented on this record.

In the courts below, the compelling interest test was watered down beyond recognition. The courts below misunderstood the compelling interest test in three distinct ways. We identify the correct legal standards in this section, and apply those standards in section IIB.

1. The Courts Below Erroneously Relied On Interests That The City Does Not Pursue In Secular Contexts

The City's alleged compelling interest must fit the law it is alleged to justify. If a law discriminates against religion, the City must show a compelling reason *for discriminating against religion*. The City cannot suppress religious worship in pursuit of interests that it does not pursue in secular contexts. Rather, the City must show that the religious practice of animal sacrifice poses some special danger that is not posed by any permissible reason for killing animals, that the City's interest in suppressing this special danger is compelling, and that no less restrictive means would satisfy its interest.

The City's obligation to justify the discriminatory feature of discriminatory ordinances is inherent in the compelling interest test; it is also inherent in *Smith*'s emphasis on discrimination as the trigger for strict scrutiny.

The requirement is explicit in other opinions of this Court, most recently in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S.Ct. 501. *Simon & Schuster* squarely holds what *Smith* implies: a law that singles out First Amendment activity for different and hostile treatment can be justified only by a compelling interest in the statutory classification -- not by more general interests that are not generally pursued.

The Court in *Simon & Schuster* found compelling interests in compensating crime victims and in depriving criminals of the fruits of their crime. *Id.* at 509-10. But the Court unanimously held these compelling interests irrelevant, because they did nothing to justify New York's distinction between income and assets from publications and income and assets from all other sources. *Id.* at 510. The fatal defect was that "the *distinction* drawn by the Son of Sam law has nothing to do with the State's interest." *Id.* (emphasis added).

There, as here, the law was not generally applicable. There, as here, the law singled out an activity protected by the First Amendment. There, as here, the state relied on general interests that it did not pursue in other contexts. The decision below is squarely inconsistent with *Simon & Schuster*; the only difference is that one case involves speech and the other religious exercise.

The Court put the same point in slightly different terms in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), invalidating a law that forbad the mass media to publish the names of rape victims. The state's failure to prohibit anyone else from spreading the names of rape victims raised "serious doubts" about whether the statute actually served the state's interest. *Id.* at 540. The Court said that the state "must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly." *Id.* In *Florida Star*'s formulation, the state's failure to generally pursue its alleged interest shows that

even the state does not consider the interest compelling, or that even if the interest is compelling, the statute does not serve that interest. In *Simon & Schuster*'s formulation, even a compelling general interest does not justify a narrower and discriminatory classification. These are minor variations on the same point: because the compelling interest must fit the challenged statute, the City must have a compelling interest in singling out religion.

Earlier cases also illustrate the point. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585-90 (1983)("critical" interest in raising revenue "cannot justify the special treatment of the press"); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104-05 (1979)("even assuming the statute served a state interest of the highest order, it does not accomplish its stated purpose" where it singles out newspapers for special regulation).

These cases reflect a settled rule that where the compelling interest test applies to discriminatory regulation, the state must show a compelling interest in discriminating. Justice Kennedy, concurring in *Simon & Schuster*, would have gone further. He would abandon the compelling interest test and apply an absolute rule against content discrimination, subject to certain narrowly defined categorical exceptions. 112 S.Ct. at 512-15. Similar reasoning here would lead to an absolute rule prohibiting discrimination against religion. Justice Kennedy's absolute rule would avoid the temptation to rationalize discrimination against unpopular minority religions; it would recognize that it is never necessary or legitimate to discriminate against religious exercise.

Neither court below required the City to prove a compelling interest in discriminating against religion. Rather, the City was permitted to rely on interests that it does not pursue in secular contexts. Under either Justice Kennedy's formulation, or the more traditional compelling interest test, the judgment below cannot stand.

2. The Courts Below Erroneously Equated "Compelling" Interests With "Legitimate" Interests

The courts below reduced the requirement of a "compelling" interest to a requirement of a rational or legitimate interest. This appears most clearly in the following passage, from a part of the district court's opinion on which the court of appeals relied:

> Equally compelling is the City's interest in the protection of animals from cruelty and unnecessary killing. "It has long been the public policy of this country to avoid unnecessary cruelty to animals." *Humane Society of Rochester v. Lyng*, 633 F.Supp. 480, 486 (W.D.N.Y. 1986). The Florida Supreme Court observed more than two decades ago that "it is now generally recognized that legislation which has for its purpose the protection of animals from harassment and ill-treatment is a valid exercise of the police power." *C.E. America, Inc. v. Antinori*, 210 So.2d 443, 444 (Fla. 1968).

Pet.App. A44-A45.

This is the entire discussion of whether the City's interest in protecting animals is compelling. By treating the two cited cases as dispositive on the question whether a compelling interest was at stake, this passage assumes that any "public policy" or any "valid exercise of the police power" satisfies the compelling interest test. And because the courts below treated the interest in protecting animals as "equally compelling" with the alleged threats to health, it appears that this watering down of the compelling interest test infected the entire opinion. The lower courts' approach "relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already pro-

vides" in cases not subject to strict scrutiny. *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 141-42 (1987)(opinion of the Court, *quoting Bowen v. Roy*, 476 U.S. 693, 727 (1986)(O'Connor, J., concurring in part)).

The lower courts' approach shows fundamental misunderstanding of the compelling interest test. It is not every or even most legitimate government interests that are compelling. "Compelling" does not mean merely a "reasonable means of promoting a legitimate public interest." *Hobbie*, 480 U.S. at 141. Compelling does not mean merely "important." *Thomas v. Review Board*, 450 U.S. at 719. Rather, "compelling interests" include only those few interests "of the highest order," *Smith*, 494 U.S. at 888; *Wisconsin v. Yoder*, 406 U.S. at 215, or in a similar formulation, "[o]nly the gravest abuses, endangering paramount interests," *Sherbert v. Verner*, 374 U.S. at 406, *quoting Thomas v. Collins*, 323 U.S. 516, 530 (1945). This Court explains "compelling" with superlatives: "paramount," "gravest," and "highest." Petitioners believe that these words mean what they say. The courts below did not.

Even such paramount interests are sufficient only if they are "not otherwise served," *Yoder*, 406 U.S. at 215, if "no alternative forms of regulation would combat such abuses," *Sherbert*, 374 U.S. at 407, and if the challenged law is "the least restrictive means of achieving" the compelling interest, *Thomas v. Review Board*, 450 U.S. at 718.

The stringency of the compelling interest test appears most clearly in *Wisconsin v. Yoder*, invalidating Wisconsin's compulsory education laws as applied to Amish children. 406 U.S. at 219-29. "[E]ducation is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The first two years of high school are basic to that function. But the state's interest in the first two years of high school was not sufficiently compelling to

justify a serious burden on free exercise. *Smith* reaffirmed *Yoder*. 494 U.S. at 881.

The unemployment compensation cases also illustrate the point. The government's interest in saving money is legitimate. But it is not sufficiently compelling to justify refusing compensation to those whose religious faith disqualified them from employment. *Sherbert v. Verner*, 374 U.S. at 406-09, reaffirmed in *Smith*, 494 U.S. at 884. The City must show something more compelling than saving money, more compelling than educating Amish children.

This Court has found a compelling interest in only three free exercise cases.[11] In each, strong reasons of self-interest or prejudice threatened unmanageable numbers of false claims to exemption, *and* the laws at issue were essential to national survival or to express constitutional norms: racial equality in education, *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983), collection of revenue, *United States v. Lee*, 455 U.S. 252, 258-60 (1982), and national defense, *Gillette v. United States*, 401 U.S. 437, 461-62 (1971). For example, the Court feared that "the tax system could not function" if every taxpayer could object to expenditures that allegedly violated his religious beliefs. *Lee*, 455 U.S. at 260.

Nothing in *Smith* reduced this stringent standard. A principal part of *Smith*'s rationale for restricting the *scope* of the compelling interest test was to maintain its

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[11] Other cases rejecting free exercise claims refused to apply the compelling interest test, holding that it does not apply to restrictions on religious liberty in the military, *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986), in prisons, *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987), or to the government's refusal to itself participate in plaintiff's religious observance, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988); *Bowen v. Roy*, 476 U.S. at 699-700. Because each of these cases held the compelling interest test inapplicable, none of them found a compelling interest.

stringency in the narrower range of cases to which it would apply. This Court cautioned against watering down the test: "if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in other fields where it is applied), many laws will not meet the test." 494 U.S. at 888.

The stringency of the compelling interest test makes sense in light of its origins: it is a judicially implied exception to the constitutional text. *See* Douglas Laycock, "Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights," 99 Yale L.J. 1711, 1744-45 (1990)(book review). The Constitution does not say that government may prohibit free exercise for compelling reasons. Rather, the Constitution says absolutely that there shall be "no law" prohibiting free exercise. The implied exception is based on necessity, and its rationale runs no further than cases of clear necessity. If the City can overcome free exercise rights by invoking any legitimate public policy, or any valid exercise of the police power, then the Free Exercise Clause imposes no independent limits on the City's policies, and constitutional rights are reduced to mere exhortations.

3. The Courts Below Reversed the Burden of Proof

Under this Court's precedents, the City must prove its compelling interest. To do so, the City must prove that serious harms are actually occurring as a result of petitioners' sacrifices. It cannot rely on speculation about what might happen, or on theoretical risks unconfirmed by experience. Mere "fear or apprehension" cannot be enough, because government can always show fear and apprehension. "Any departure from absolute regimentation may cause trouble." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969). "[O]ur Constitution says we must take this risk."

Id.

Defending its compulsory education law in *Yoder*, Wisconsin relied on the plausible fear that some Amish children would "choose to leave the Amish community" and that they would "be ill-equipped for life." 406 U.S. at 224. This Court rejected that fear as "highly speculative," demanding "specific evidence" that Amish adherents were leaving and that they were "doomed to become burdens on society." *Id.* at 224, 225. Similarly, various states have feared that a combination of false claims and honest adoption of religious objections to work would dilute unemployment compensation funds, hinder the scheduling of weekend work, increase unemployment, and encourage employers to make intrusive inquiries into the religious beliefs of job applicants. Some of these fears were plausible; some were not. But this Court rejected them all for lack of evidence that they were really happening. *Frazee v. Illinois Dep't of Employment Security*, 489 U.S.at 835; *Thomas v. Review Board*, 450 U.S. at 718-19; *Sherbert v. Verner*, 374 U.S. at 407.

The courts below turned this evidentiary requirement on its head, repeatedly requiring the Church to prove that no animal sacrifice would ever cause harm. *See* Pet.App. A13 ("there is no guarantee" that all arteries will be cut simultaneously); *id.* at A43 (relying on "a risk of physical harm"); *id.* at A45 ("plaintiffs have not shown" that regulating care of animals and disposal of carcasses would satisfy the City's concerns); *id.* at A46 n.59 ("Pichardo could give this Court no assurance" that deviant practitioners would obey regulations). Religious worshipers are not required to prove that there is no risk; instead the City is required to prove that serious harms are actually happening.

B. When The Proper Legal Standards Are Applied, It Is Clear That These Ordinances Do Not Serve A Compelling Interest By The Least Restrictive Means

There is no compelling interest in this case, and this Court should say so. The Court can define "compelling interest" with synonyms and abstract explanations, but it can effectively convey its meaning only by holding that particular facts do or do not justify discriminatory regulation of religion. With complex legal concepts like compelling interest, the "outer limits will be marked out through case-by-case adjudication." *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968). Thus, in the great bulk of the cases cited in this part of the brief (part II), this Court itself applied the compelling interest test, and held that the government had or had not shown a compelling interest. The record is ample to do so here. The factual basis of the lower courts' holding is clear, and that factual basis is clearly insufficient to support a conclusion of compelling interest.

The courts below reached legal conclusions of compelling interest on the basis of expert testimony to specific facts. The issue presented to this Court is whether these specific facts justify discriminatory restrictions on religion. That is a legal question on which this Court has the final word.

To answer that legal question, this Court must "make an independent examination of the whole record." *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 499 (1984), *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964). But this independent examination of the record is for a limited and defined purpose. The district court accepted the testimony of the City's experts, and petitioners do not ask this Court to reconsider that determination. But the district court's findings must be read in light of the specific facts to which those experts testified, and those facts must be separated from

conclusions that depend on judgments of law, policy, or degree.

When this separation is made, the evidence simply will not support a legal conclusion of compelling interest in discriminatory suppression of animal sacrifice. Most of the City's broad claims of government interest are speculative and unproven, and none of them is sufficiently important to be compelling. In analogous secular contexts, the City either does not pursue these interests at all, or it pursues them to a lesser degree and by less restrictive means.

1. The Harm To Animals

The courts below held that the City has a compelling interest in protecting animals from "cruelty and unnecessary killing." Pet.App. A44. The holding that animals are *unnecessarily* killed depends on the impermissible conclusion that petitioners' worship is unnecessary. *See supra* at 21-23.

Apart from lack of necessity, the trial judge held that the City has a compelling interest in preventing three kinds of cruelty. Two of these holdings are obviously discriminatory. He found that animals experience fear prior to sacrifice, and that some suppliers of animals inadequately feed and house them. Pet. App. A17-A18, A45. But no government agency attempts to eliminate these problems in secular contexts, so they cannot be compelling reasons for preventing religious worship. One of the City's experts testified that animals would experience similar fear in a commercial slaughterhouse or any other strange place. R12-911. Another testified that no government agency regulates the care of farm animals. R13-1014, 1016. In any event, the commercial suppliers of sacrificial animals can be regulated directly. Commercial abuses by others are not a reason to suppress petitioners' worship.

We come then to the essence of the alleged cruelty issue. The animals are sacrificed by cutting the carotid arteries with a single knife stroke. Pet. App. A12. Cutting the carotid arteries is approved as humane by both Florida and federal statutes on religious slaughter. Fla. Stat. Ann. §828.23(7)(b)(1976)(Br.App. A7); 7 U.S.C. §1902(b)(1988).[12] The other approved method, used in non-Kosher slaughterhouses, is to render the animal unconscious before slaughter. 7 U.S.C. §1902(a)(1988).

Based on the testimony of the City's expert, Dr. Fox, the trial court found that "there is no guarantee" that the priest can cut all the arteries at the same time, that some animals have third and fourth carotid arteries, and that sometimes, the arteries close themselves off, thus delaying death. Pet.App. A13. Dr. Fox testified that if all the arteries were severed simultaneously, the animal would become unconscious "very rapidly." R12-891. But if fewer than all the arteries were severed, the animal would become unconscious "slowly," over a period of "many seconds to minutes." *Id.*

The City's alleged compelling interest is to protect animals from this brief period of consciousness in those cases in which the priest fails to sever all arteries simultaneously and does not realize that he has failed. Dr. Fox did not estimate, and the trial judge did not find, how often such errors would occur. This risk of brief

[12] These substantially identical provisions, together with related provisions in Fla. Stat. Ann. §828.22(3)(1976)(Br.App. A6) and 7 U.S.C. §1906 (1988), declare a policy of protecting religious liberty, exempt ritual slaughter in accord with the requirements of any religious faith, and subject ritual slaughter to alternative, less restrictive regulations. Petitioners argued unsuccessfully in the court of appeals that these laws pre-empt the Hialeah ordinances at issue here. Br. of Appellants in Ct.App. 53-55. The federal pre-emption argument was not preserved in the district court, and therefore is not pressed here. Even so, the federal government's resolution of these issues is further evidence that the City's interest is not compelling.

harm to animals is simply insufficient to justify suppression of a constitutionally protected worship service. "The *magnitude* of the State's interest in this statute is not sufficient to justify" these ordinances. *Smith v. Daily Mail Publishing Co.*, 443 U.S. at 104 (emphasis added). Not only did the City fall far short of showing a compelling interest; the City did not prove any harm at all. All living things must die, and the City made no effort to prove that sacrifice is more painful than the alternatives for these animals.

In secular contexts, state and local policy permits practices that inflict much greater and longer lasting pain on animals. Certainly "there is no guarantee" that hunted, fished, or trapped animals will die "very rapidly," or even that they will die in "seconds to minutes." In fact, state and local policy on hunting, fishing, and trapping shows little concern for the suffering inflicted on animals. Using one animal to hunt another is expressly exempted from the animal cruelty statutes. Fla. Stat. Ann. §§828.122(6)(b), (6)(e)(Supp. 1992), incorporated in Ord. 87-40. Trapping is legal in Florida. *Id.* §§372.57 (2)(i), (2)(j), (3). Florida has hunting seasons in which modern firearms are forbidden but muzzle-loading guns are permitted, *id.* §372.57(5)(c), and seasons in which firearms are forbidden but bow hunting is permitted, *id.* §372.57(5)(d). No weapon is guaranteed to achieve a clean kill, but these pre-modern weapons are especially likely to inflict nonfatal injury, festering wounds, or slow death. Dr. Fox was opposed to bow hunting. R12 at 912-13. But Florida actively encourages the activities that cause these risks, and residents of Hialeah may participate.

Other areas of regulation reveal a similar tolerance of pain inflicted for secular reasons. The humane slaughter rules do not apply at all to any person slaughtering and selling "not more than 20 head of cattle nor more than 35 head of hogs per week." Fla. Stat.

Ann. §828.24(3)(Supp. 1992)(Br.App. A7), incorporated in Ord. 87-40. Neither state nor local law requires exterminators to use the most humane methods of killing animals. It is permissible to inflict "pain and suffering" on animals "in the interest of medical science." *Id.* §828.02 (1976), incorporated in Ord. 87-40.

Dr. Fox's specific testimony, on which the district court relied, reveals the standards on which he based his conclusion that sacrifice is inhumane. Under Dr. Fox's standards, a method of sacrifice is unacceptable if it takes "seconds to minutes" when something goes wrong, and if no one can "guarantee" that nothing will ever go wrong. If applied generally, these standards would shut down Kosher slaughterhouses as well as Santeria worship services. Dr. Fox thought the Jewish and Muslim knife stroke from the front of the throat is somewhat more reliable than the Santeria knife stroke, which goes from one side through to the other. R12-887. But he testified that animals killed in Kosher slaughterhouses often fail to die immediately, R12-881, and he supports more restrictive regulation of Kosher slaughterhouses. R12-902, 917. Kosher slaughterhouses operate under the statutory exemptions described in footnote 12, but Dr. Fox's organization would repeal those exemptions. R14-1056.

No legislature has applied Dr. Fox's standards to Kosher slaughterhouses, but the courts below relied on Dr. Fox's standards to uphold suppression of Santeria. Because Florida and Hialeah permit humans to inflict much greater suffering on animals for a wide variety of secular reasons, *and* because the interest in protecting animals from religious sacrifice is simply not important enough to override a constitutional right, this interest cannot be compelling.

2. The Alleged Threat To Public Health

The trial judge found a threat to public health, because some unidentified practitioners of animal sacrifice

sometimes improperly dispose of carcasses in public places. Pet.App. A43. Dead animals harbor germs, and the germs can be spread by other animals that come to feed on the carcass. But the judge found that "[t]here have been *no* instances documented of any infectious disease originating from the remains of animals being left in public places." *Id.* at A18 (emphasis added).

The City's interest in eliminating this marginal increment to the risk of disease is not compelling. The risk is not different from the risk from any other organic garbage, and the incremental risk is a tiny part of the total problem. The district court's finding of increased risk was based on the testimony of Mr. Walter R. Livingstone, Environmental Administrator for the Dade County Department of Public Health. But he testified that the problem comes from many sources:

> We do find dead chickens or dead animals, dead fish is one thing, dead garbage in fact, garbage from restaurants and things like that, animal meat parts and things like that this is where they provide the food for the rat, the rat comes and then seeks a harborage area and makes regular runs.

R11-566.

> Q. In your study of rats, did you find the restaurants to be probably the largest place that rats congregate?
>
> A. I wouldn't say the largest. They're very commonplace. Because of the very fact that we have so many other facilities. A lot of times, public buildings are a good place. Restaurants would be one because, generally speaking, because of the garbage, they provide a lot of food for the rodents . . .

R11-590.

> I don't believe what we're talking about here today has anything to do with animal sacrifice.
>
> It is just the way that food, chickens, parts, et cetera, are handled and their presence can increase the spread of disease.

R11-592.

> As I said before, you are trying to change this into animal sacrifice, and I haven't been speaking of animal sacrifice at all. I am talking about the possibility, the probability, the transmission of disease from animal to human via the description, via the situations you have asked me about all day.

R11-594.

There was no direct evidence of the number of sacrificed animals improperly disposed of, but there was evidence that the problem is modest. Ms. Zorida Diaz Albertini, Director of Animal Services for Dade County, testified that two crews pick up all the dead animals in the public right of way in Dade County. R10-450. She testified that "the majority of the animals are cats and dogs." R10-452. In addition, "[w]e get raccoons, we get armadillos, birds, all kinds of wild animals." *Id.* Cats, dogs, raccoons, armadillos, and wild animals are not sacrificed; most birds are not sacrificed. She did not mention any of the animals that are sacrificed.

Thus, according to the record evidence, the problem of improperly discarded sacrificial animals is a small part of the problem of dead animals, which in turn is a very small part of the problem of organic garbage. The plain implication of Mr. Livingstone's testimony is that the risk of disease from the garbage dumpsters of restaurants and public buildings -- and from grocery stores, butcher

shops, apartment buildings, and private homes -- dwarfs the risk of disease from the improper disposal of sacrificed animals. Ms. Diaz Albertini's testimony is that cats and dogs are more numerous -- "a majority" -- than improperly discarded sacrificed animals.

The City has not banned all ownership of cats and dogs to keep a few of them from being hit by cars, but it has banned all sacrifice of animals to keep a few of them from being improperly discarded. Similarly, Mr. Livingstone testified that his department gets "frequent complaints from neighbors about the way that veterinarians dispose of their animal remains," R11-556, but these complaints have not led the City to ban the practice of veterinary medicine. The City's prophylactic ban on religious exercise is not neutral. It is also inconsistent with the reasoning in *Schneider v. State*, 308 U.S. 147, 162-63 (1939). There the Court held that cities could not ban all distribution of leaflets because some leaflets were improperly dropped in the streets.

The City can address the problem of improper disposal directly, by requiring proper disposal and by prosecuting violators. It is not difficult to properly dispose of a sacrificed animal. Mr. Livingstone testified that it is safe to put the carcass in a plastic bag and to put the plastic bag in a garbage can. R11-555. It would be especially easy to detect improper disposals from a fixed and public place of worship, such as that proposed by petitioners.

The trial judge found a compelling interest in public health, but not because he found a grave abuse, and not because he found that animal sacrifice was more dangerous than any other source of organic garbage. He found a compelling interest because he equated compelling interest with any incremental reduction of risk, and because he let the City prohibit religious exercise for reasons that the City does not deem sufficient to justify prohibition of secular conduct.

3. The Alleged Threat To Private Health

The courts below also found a threat to private health. Many of the sacrificed animals are eaten, and the meat is not inspected by any public authority. But there was no evidence that any person has ever become ill from eating a sacrificed animal.

Once again, the City relies on an interest that it pursues only with respect to religious sacrifice. Hunters eat their kill, and fishers eat their catch, but neither Florida nor Hialeah requires its hunters and fishers to submit this meat for public inspection. A Florida statute requires inspection of commercially sold meat. Fla. Stat. Ann. §585.70 *et seq.* (1992 Supp.). But the statute has several express exemptions, including slaughter of animals raised for the use of the owner and "members of his household and nonpaying guests and employees." §585.88(1)(a). Thus, the relevant public policy is that the owner of an animal can kill it for noncommercial food consumption, and that any risk from this activity is too small to justify government regulation. The interest in eliminating this small risk does not suddenly become compelling when the animal is sacrificed as part of a worship service.

Once again, the trial court's error was to equate any incremental risk with a compelling interest. That standard would justify any regulation. As Mr. Livingstone testified, "There is always the threat of disease when you eat food." R11-591. Indeed, he testified that there is no "activity a human being can engage in without triggering the risk of disease." R11-585. Such a universal risk cannot be a reason for prohibiting a constitutionally protected activity.

4. The Alleged Interest In Zoning

Finally, the district court said that "the City has a compelling interest in prohibiting the slaughter or sacri-

fice of animals within areas of the City not zoned for slaughterhouse use." Pet.App. A45. Neither court explained this holding, and neither court made any findings to support it.

There is no finding and no evidence that religious sacrifice of animals presents the same problems as slaughterhouses. Indeed, the City's evidence is to the contrary, because religious sacrifice involves many fewer animals at a time. A Deputy City Attorney testified that a church sacrificing animals is not a slaughterhouse. R15-1345. The City persuaded the trial court that Santeria's secrecy makes regulations unenforceable. Pet. App. A46 n.59. If the practice is difficult to detect even when you search for it, it cannot be a compelling zoning problem.

A church practicing frequent animal sacrifice could be located in any zone that permits restaurants, grocery stores, butchers, veterinarian offices, pet shops, humane societies, or farms. The public health officer testified that the problems of disposal and sanitation are analogous. *See supra* at 42-43. Persons practicing occasional sacrifice in their homes pose no more threat than hunters who occasionally bring their kill back to their homes, and much less threat than the daily disposal of meat scraps and other garbage by the entire population of Hialeah. As previously noted, even a whole carcass can be safely disposed of in a plastic bag and a garbage can. R11-556.

In fact, the Hialeah ordinances are not zoning laws at all. The zoning characterization ignores the context of these ordinances, the express purpose of preventing the exercise of petitioners' religion, and the gerrymanders to implement that purpose. The ordinances do not confine petitioners' worship to an appropriate zone; they exclude it from the City. On the other hand, the ordinances do not exclude all killing of animals from the City. Veterinarians, humane societies, pet owners, exter-

minators, seafood restaurants, fishers, and farmers may kill animals in the City. The zoning rationale cannot disguise the patent discrimination against religion in these ordinances.

The Fifth Circuit has held that the zoning power may not exclude a church from all accessible locations within the city. *Islamic Center, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988). To similar effect in a speech case is *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, holding that a municipality cannot use the zoning power to exclude all live entertainment from its borders. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* at 76-77, *quoting Schneider v. State*, 308 U.S. 147, 163 (1939).

These cases are not affected by *Employment Division v. Smith*. Neither Florida nor Hialeah has any neutral, generally applicable law against killing animals. In the absence of such a law, religious sacrifice of animals is a constitutionally protected activity. The rule of *Schad* and *Islamic Center* is that a constitutionally protected activity cannot be zoned out of the City and confined to the hinterlands.

Even if the ordinances were neutral, the zoning rationale would be within *Smith*'s exception for "individual" consideration. Modern zoning and land use law is administered through development agreements, building permits, zoning permits, certifications, special exceptions, variances, waivers, special use permits, amortization of nonconforming uses, and other procedures through which owners and land use authorities negotiate the permissible uses for each parcel of land. *See, e.g.*, Fla. Stat. Ann. §163.3220 et seq (1990). These procedures inherently involve the sort of individualized consideration in which religion must be treated equally with other favored interests. Because zoning law "has in place a system of individualized exemptions, it may not refuse to extend that

system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884.

• • •

The pattern is the same with respect to all the alleged compelling interests. If the Court will examine the specific facts to which the City's experts testified, no compelling interest is shown. When courts accept the experts' conclusory labels, like "increased risk" or "inhumane," effective power to decide the controlling question of law is delegated from the courts to expert witnesses. These witnesses are called by parties and may be highly partisan on the issues in the case.[13] Only courts can decide whether the specific facts in evidence show a compelling interest sufficient to justify suppression of the central religious ritual of an ancient but unpopular minority faith. Under the standards repeatedly applied by this Court, the interests alleged here are plainly insufficient.

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[13] For example, Dr. Fox was Vice-President of the Humane Society of the United States, Pet.App. A13 n.18, and the City's witness Mr. Paulhus was its regional director, R13-976. Their organization filed a brief in the court of appeals "as *Amicus Curiae* in Support of Appellee, City of Hialeah."

CONCLUSION

Hialeah has not made it a crime to kill animals. Rather, Hialeah has made it a crime to sacrifice animals to one's God. Whatever the details and minor differences among the ordinances, the fundamental question in this case is whether religious animal sacrifice can be singled out for discriminatory prohibition. This Court's cases are clear; the answer is no.

Justice Scalia's description of the law in *Florida Star v. B.J.F.* is equally apt here:

> This law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself. Such a prohibition does not protect an interest "of the highest order."

491 U.S. at 542 (concurring). Substitute "an unfamiliar religion" for "the press," and his description fits this case perfectly. Hialeah is prepared to suppress religious sacrifice of animals, but it is not prepared to give up all the other reasons for which the City and its citizens kill animals every day. Hialeah has done precisely what the Constitution most squarely forbids.

This Court should reverse the judgment below and remand the case to the district court for entry of a decree that would forbid the City to enforce these ordinances against petitioners' religious practices.

Respectfully submitted,

Douglas Laycock
(*Counsel of Record*)
727 East 26th Street
Austin, Texas 78705
512-471-3275

Nina E. Vinik
American Civil Liberties Union
Foundation of Florida
225 N.E. 34th Street
Miami, Florida 33137
305-576-2337

Steven R. Shapiro
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Jeanne Baker
Baker & Moscowitz
200 South Biscayne Boulevard
Miami, Florida 33131-5306
305-379-6700

Jorge A. Duarte
44 West Flagler Street
Miami, Florida 33130
305-358-2400

Mitchell Horwich
Horwich & Zager, P.A.
1541 Sunset Drive
Coral Gables, Florida 33143
305-666-5299

Dated: May 22, 1992

APPENDIX

CITY OF HIALEAH ORDINANCE NO. 87-40
Adopted June 9, 1987

WHEREAS, the citizens of the City of Hialeah, Florida, have expressed great concern over the potential for animal sacrifices being conducted in the City of Hialeah;

. . . .

Section 1. The Mayor and City Council of the City Hialeah, Florida, hereby adopt Florida Statute, Chapter 828 - "Cruelty To Animals" (copy attached hereto and made a part hereof), in its entirety (relating to animal control or cruelty to animals), except as to penalty.

. . . .

CITY OF HIALEAH ORDINANCE NO. 87-52
Adopted September 8, 1987

WHEREAS, the residents and citizens of the City of Hialeah, Florida, have expressed great concern regarding the possibility of public ritualistic animal sacrifices within the City of Hialeah, Florida;

. . . .

Section 1. Chapter 6 of the Code of Ordinances of the City of Hialeah, Florida, is hereby amended by adding thereto two (2) new Sections 6-8 "Definitions" and 6-9 "Prohibition Against Possession Of Animals for Slaughter or Sacrifice", which is to read as follows:

Section 6-8. Definitions

1. Animal - any living dumb creature.
2. Sacrifice - to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.

3. Slaughter - the killing of animals for food.

Section 6-9. Prohibition Against Possession of Animals for Slaughter or Sacrifice.

1. No person shall own, keep or otherwise possess, sacrifice, or slaughter any sheep, goat, pig, cow or the young of such species, poultry, rabbit, dog, cat, or any other animal, intending to use such animal for food purposes.

2. This section is applicable to any group or individual that kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.

3. Nothing in this ordinance is to be interpreted as prohibiting any licensed establishment from slaughtering for food purposes any animals which are specifically raised for food purposes where such activity is properly zoned and/or permitted under state and local law and under rules promulgated by the Florida Department of Agriculture.

. . . .

CITY OF HIALEAH ORDINANCE NO. 87-71
Adopted September 22, 1987

WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community;

. . . .

Section 1. For the purpose of this ordinance, the word sacrifice shall mean: to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.

Section 2. For the purpose of this ordinance, the word animal shall mean: any living dumb creature.

Section 3. It shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida.

. . . .

CITY OF HIALEAH ORDINANCE NO. 87-72
Adopted September 22, 1987

WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the slaughtering of animals on the premises other than those properly zoned as a slaughter house, in contrary to the public health, safety and welfare of the citizens of Hialeah, Florida.

. . . .

Section 1. For the purpose of this Ordinance, the word slaughter shall mean: the killing of animals for food.

Section 2. For the purpose of this Ordinance, the word animal shall mean: any living dumb creature.

Section 3. It shall be unlawful for any person, persons, corporations or associations to slaughter any animal on any premises in the City of Hialeah, Florida, except those properly zoned as a slaughter house, and meeting all the health, safety and sanitation codes prescribed by the City for the operation of a slaughter house.

. . . .

Section 6. This Ordinance shall not apply to any

person, group, or organization that slaughters, or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.

. . . .

CITY OF HIALEAH RESOLUTION NO. 87-66
Adopted June 9, 1987

WHEREAS, residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety, and

WHEREAS, the Florida Constitution, Article I, Declaration of Rights, Section 3, Religious Freedom, specifically states that religious freedom shall not justify practices inconsistent with public morals, peace or safety.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

1. The City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety.

CITY OF HIALEAH RESOLUTION NO. 87-90
Adopted August 11, 1987

WHEREAS, the residents and citizens of the City of Hialeah, Florida, have expressed great concern regarding the possibility of public ritualistic animal sacrifices in the City of Hialeah, Florida;

. . . .

NOW, THEREFORE, BE IT RESOLVED BY

THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

Section 1. It is the policy of the Mayor and City Council of the City of Hialeah, Florida, to oppose the ritual sacrifices of animals within the City of Hialeah, Florida. Any individual or organization that seeks to practice animal sacrifice in violation of state and local law will be prosecuted.

WEST'S FLORIDA STATUTES ANNOTATED
CHAPTER 828. CRUELTY TO ANIMALS

828.12. Cruelty to animals
[1987 version, as incorporated into Ord. 87-40]
(1982 Fla. Laws ch. 82-116, §1)

Whoever unnecessarily overloads, overdrives, tortures, torments, deprives of necessary sustenance or shelter, or unnecessarily or cruelly beats, mutilates, or kills any animal, or causes the same to be done, or carries in or upon any vehicle, or otherwise, any animal in a cruel or inhuman manner, shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or by a fine of not more than $5,000, or both.

828.12. Cruelty to animals
[as amended in 1989, now in effect as Florida law, but not part of Hialeah law]

(1) A person who unnecessarily overloads, overdrives, torments, deprives of necessary sustenance or shelter, or unnecessarily or cruelly beats, mutilates, or kills any animal, or causes the same to be done, or carries in or upon any vehicle, or otherwise, any animal in a cruel or inhumane manner, is guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or by a fine of not more than $5,000, or both.

(2) A person who tortures any animal with intent to

inflict intense pain, serious physical injury, or death upon the animal is guilty of a felony of the third degree, punishable as provided in §775.082 or by a fine of nor more than $10,000, or both.

828.22. Humane slaughter requirement

. . . .

(2) It is therefore declared to be the policy of this state to require that the slaughter of all livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods and to provide that methods of slaughter shall conform generally to those employed in other states where humane slaughter is required by law and to those authorized by the Federal Humane Slaughter Act of 1958, and regulations thereunder.

(3) Nothing in this act shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group. Notwithstanding any other provision of this act, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this act. For the purposes of this action the term "ritual slaughter" means slaughter in accordance with §828.23(7)(b).

828.23. Definitions

As used in §§828.22 to 828.26, the following words shall have the meaning indicated:

. . . .

(7) "Humane method" means either:

(a) A method whereby the animal is rendered insensible to pain by mechanical, electrical, chemical, or other means that are rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or

(b) A method in accordance with ritual requirements of any religious faith whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument.

828.24. Prohibited acts; exemption

(1) No slaughterer, packer, or stockyard operator shall shackle, hoist, or otherwise bring livestock into position for slaughter, by any method which shall cause injury or pain.

(2) No slaughterer, packer, or stockyard operator shall bleed or slaughter any livestock except by a humane method.

(3) This act shall not apply to any person, firm or corporation slaughtering or processing for sale within the state not more than 20 head of cattle nor more than 35 head of hogs per week.